IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PEITION NO.1709 OF 2003

M/s.Permanent Magnets Ltd. ...Petitioner.

Versus

The workmen Employed & Anr. ...Respondents.

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Mr.M. S. Naik with Mr. S.K. More i/b. S.M. Naik for the Petitioner.
Mr. N. M. Ganguli for Respondent No.1.

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CORAM : DR. D.Y. CHANDRACHUD, J.

August 23, 2006.

ORAL JUDGMENT :

This petition is directed against an Award of the Industrial Tribunal dated 13th November 2002 in a reference to adjudication under Section 10 of the Industrial Disputes Act, 1947. The State Government referred an industrial dispute relating to the demand for permanency of 43 casual workmen for adjudication before the Industrial Tribunal. During the pendency of the Reference, some of the workmen covered by the reference resigned from service whereas certain others informed the Industrial Tribunal that they did not wish to pursue with their claim any further. As a result, the reference

survived in relation to eighteen workmen. By its award, the Tribunal directed the Petitioner to grant permanency to those 18 workmen with effect from the date of the reference, namely, 29th October 1993 and to pay them wages and extend other facilities that are available to the permanent workmen of the establishment. The award of the Industrial Tribunal was stayed during the pendency of these proceedings. The Petition has now been placed for hearing and final disposal.

2. The basis of the claim before the Industrial Tribunal was that a majority of the workmen who owed allegiance to the Kamgar Utkarsha Sabha, resigned in 1990 from the membership of that Union and joined the Association of Engineering Workers. The claim of the workmen was that they have been working for periods ranging between 3 and 11 years and, though they were attending to work of a permanent nature, they had not been granted the benefit of permanency. The contention of the workmen was that they were given breaks in service and that new casual workmen were appointed in their place. The management filed its Written Statement stating that it had in regular employment at its Factory about 233

permanent workmen. The management stated that it had a pool of 65 casual workers which included twenty one persons whose names were mentioned in the schedule to the order of the Reference. Twenty one other persons whose names were mentioned in the schedule were, according to the management, neither engaged as casuals, nor were they on their rolls. According to the management, these casual workers were engaged when the permanent workmen were unavailable for work either as a result of absence or leave. The management contended that as and when a permanent vacancy arose, persons from amongst the casual workers who are found to be suitable on the basis of merit-cum-seniority were being made permanent. According to the management, except for twenty one persons in the order of reference, the rest of the workmen had not been reporting since a little prior to July 1993.

3. On behalf of the workmen, evidence was adduced of three workmen while on behalf of the management two witnesses, namely, the Supervisor (Personnel and Administration) and a Production Manager deposed in evidence. The Industrial Tribunal, as noted

above, allowed the Reference in part, by directing the management to confer the benefit of permanency with consequential service conditions upon eighteen workmen from the date on which the order of reference was made.

4. The order of the Tribunal is challenged on behalf of the Petitioner. The submission that has been urged before the Court was that the onus to establish that the workmen had attained permanency, under Model Standing Order 4C of the Model Standing Orders framed under the Industrial Employment (Standing Orders) Act, 1946 on the completion of 240 days' service lay on the workmen. In the present case, it was submitted that there was no pleading to the effect that the workmen had completed 240 days, nor was there evidence to that effect. Counsel further submitted that in the absence of a vacancy, the mere completion of a period of 240 days would not result in the conferment of permanency. Finally, the order of the Tribunal was also questioned on the ground that the Tribunal erred in allowing the reference and granting relief with effect from the date of the order of reference. It was urged that the employees had admitted

that they were not on work from 1991 and it was, therefore, not appropriate in any event for the Tribunal to grant benefit from the date of the order of Reference.

5. On the other hand, Counsel appearing on behalf of the Respondent supported the order of the Tribunal by submitting that the power of the Industrial Tribunal in an adjudication under Section 10 is wide and that even if the workmen had not produced material to establish that they had completed 240 days in a calendar year, the Tribunal was justified the holding that it was not for the workmen to produce the material on the record. Counsel submitted that even otherwise dehors the completion of 240 days, it was open to the Tribunal to determine as to whether the practice of engaging casuals, over a considerable length of time, constituted an unfair labour practice.

6. In considering the submissions which have been urged on behalf of the parties, it would, at the outset, be necessary to have regard to the position in law which is now settled. The onus of

establishing the requirement of continuous service of 240 days lies on the workmen. In the **Range Forest Officer vs. S.T. Hadimani**,[1] the Supreme Court held as follows:

> "In our opinion, the Tribunal was not right in placing the onus on the Management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It is the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any Court or Tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside."

The same principle was reiterated by the Supreme Court in **Essen Deinki v. Rajiv Kumar**.[2] In **R.M. Yellatti vs. Assistant Executive Engineer**,[3] a Bench of three Learned Judges of the Supreme Court adverted to the earlier judgments on the point and held as follows :

> "Analysing the above decisions of this Court, it is clear that the provisions of the Evidence Act in terms do not apply to

1 2002 I CLR 922
2 2002 III CLR 943
3 (2006) 1 SCC 106

> the proceedings under Section 10 of the Industrial Disputes Act. However, applying general principles and on reading the aforestated judgments, we find that this Court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-wage earners, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the court the nominal muster for the given period, the letter of appointment or termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case. The above decisions however make it clear that mere affidavits or self serving statements made by the claimant workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non-production of muster rolls per se without any plea of suppression by the claimant workman will not be the ground for the Tribunal to draw an adverse inference against the management."

This decision has been followed thereafter in **ONGC Ltd. vs. Shyamal Chandra Bhowmik**.[4]

7. Before the Tribunal it was sought to be asserted on behalf of the management that the mere completion of service of 240 days

4 (2006) 1 SCC 337

would not entitle the workmen to claim permanency and that in any event there was no evidence to indicate that the workmen had completed 240 days of service in a calendar year. The Tribunal rejected the first submission by holding that upon the completion of 240 days, a right to permanency ensued. That presumably is on the basis of the provisions of Model Standing Order 4-C of the Standing Orders framed under the Industrial Standing Order Act, 1946. In so far as the second submission is concerned, the Tribunal held as follows:

> "While considering the entire process of facts and legal proposition, I have found that though the statement about completion of 240 days is not on record, it is not (for) the employee concerned to produce such record because the record has been maintained by the company. The volume of work is envisaged through the oral evidence."

The aforesaid finding of the Tribunal is inconsistent with the law laid down by the Supreme Court in the judgments to which a reference has been made hereinabove. The Tribunal was clearly in error in presuming that the workmen had attained the benchmark of 240 days despite the finding that a statement about the completion of 240 days was not on the record. In **Yellatti's** case, the Supreme Court has noted that in the case of a termination of the services of daily wage

earners, there may not be a letter of termination and no receipt or proof of payment. Thus in most cases workmen only call upon the employer to produce before the Court the muster roll for the given period, the wage register, attendance register and such other documents. The drawing of an adverse inference clearly is dependent thereafter on the facts of each case. In the present case it has not been disputed by Counsel appearing on behalf of the Respondent-Union that no direction was sought by the Union before the Tribunal for calling upon the employer to disclose the records that were in the custody and control of the employer. The statement of law of the Tribunal to the effect that it was not for the employees concerned to produce material in support of the plea that they satisfy the requirement of 240 days is not consistent with the law that has been laid down by the Supreme Court.

8. On behalf of the workmen depositions of three casual workers came to be recorded. UW-2 Jakirali during the course of his evidence initially stated that he has been working for a period of five years as a casual workman. He stated that the management did not

give him work regularly and continuously for the whole of year but he was given a break in service. The workman was not on duty since 1991. The deposition was recorded on 12th March 1997. The witness however, stated that many of the casual workmen had been granted permanency. The second workman Mahesh Ghanekar (UW1) also stated that he has been working as a casual workman for five years. In the course of the cross-examination he stated that casuals were being paid for the actual days worked in a month and that some of the casuals were made permanent. The third workman, Jayeshraj Verma (UW 5) in the course of the cross-examination stated that on an average he was getting work of 12 to 15 days. That presumably was a reference to the work that was provided every month. The evidence which was placed on the record before the Tribunal on behalf of the workmen clearly fell short of meeting the requirement that the workmen had fulfilled the requirement of 240 days' service in a calendar year. Significantly, no documentary material was on the record. In these circumstances, the Tribunal was, in my view, in error in directing conferment of permanency upon the workmen.

9. In this view of the matter, the date with effect from which permanency should have been granted really does not arise. However, there was no justification in the Tribunal having directed permanency with effect from the date of the reference , namely, 29th October 1993. The first of the three workmen who deposed in support of the claim in the reference stated that he was not on duty since 1991 whereas the third stated that he had not worked from January 1982. In these circumstances, particularly in the absence of cogent evidence relating to each of the workmen covered by the reference, the Tribunal was not justified in directing the grant of permanency together with consequential benefits with retrospective effect. Therefore, even on this count, the award cannot be sustained.

10. The attention of the Court has been drawn to the fact that a settlement has been arrived at by the management on 18th March 2002 with Kamgar Utkarsha Sabha. The settlement contemplates that the management shall make two workers each permanent on 1st April 2002, 1st January 2003 and 1st January 2004 respectively. The

settlement then provides in clause 4 that the rest of the workmen will be made permanent as and when vacancies arise. From the evidence on record, it has emerged in these proceedings that the management has not followed a consistent policy in the past for the grant of permanency to the casual workmen. The first witness for the management who deposed at the trial (Manohar Harishchandra Patil, the Supervisor in charge of Personnel and Administration) admitted that a copy of the Seniority List was not produced before the Court and that the Seniority List had not been given to any of the employees. He was unable to state the position in the Seniority List of two casual workmen who had been made permanent. The second witness who deposed on behalf of the management (Gorakh Dashrath Rai, Production Manager) squarely admitted that no Seniority List has been prepared in respect of any of the casual employees. Wages were being paid to the casual employees in cash and he stated that a chart of attendance was maintained by the Security Department. The management, it would appear, had maintained only an attendance register. No appointment letters were being given to those who have been recruited as casuals. No

attendance card was issued. In these circumstances, since a settlement now has been arrived at for the grant of permanency to the workmen, it is evident that unless an objective basis is followed for the conferment of permanency, it would be open to the management to pick and choose persons at its own whims and fancy. The workmen have legitimate concerns in regard to the manner in which permanency would be granted. Those concerns are justified having regard to the evidence of the management's witnesses. In order to obviate the aforesaid situation, Counsel appearing on behalf of the management stated on instructions that (i) The management shall forthwith maintain a Seniority List of all the casual employees who had worked with the management in the past including those who are currently discharging duties; (ii) The Seniority List shall be operated by giving work to the casual workmen, albeit on rotation; and (iii) The Seniority List will be followed by conferring permanency upon the workmen regardless of their union affiliation upon the occurrence of vacancies as contemplated in the settlement dated 18th March 2002. Counsel appearing on behalf of the management states that for the eighteen persons to whom the Tribunal granted relief, their position in

the Seniority List shall be maintained in accordance with the original date from which they were required to render work as casual workmen. Counsel stated that the management shall abide by the Seniority List while conferring permanency in accordance with the terms of the settlement subject to the physical fitness of the employees.

11. In view of the aforesaid directions, the award of the Tribunal is quashed and set aside and shall stand substituted by the directions which have been issued hereinabove in terms of the assurance given to the Court. The petition is accordingly disposed of. No order as to costs.

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